No. 2626.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

MINERS & MERCHANTS BANK, a Corporation,
Plaintiff in Error,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,
Defendant in Error.

Petition for Rehearing.

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Of Counsel.

Filed this..................................day of August, 1916.

...., Clerk.

By..Deputy Clerk.

The James H. Barry Co.,
San Francisco

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PETITION FOR REHEARING.

Plaintiff in error presents this petition and prays that a rehearing of this case may be moved and ordered.

In the decision filed herein July 3, 1916, it was held that the so-called new or last bond was an independent contract of insurance, in no way related to the original bond, and that under the pleadings and the admissions of counsel there was no continuing insurance, and that there could be no recovery under the so-called new bond on account of a loss occurring within the term of the original bond. It was so held upon the sole ground that in some respects the terms of the

so-called new or last bond varied from those of the original bond.

This conclusion was reached without discussion and presumably without consideration of some of the most important factors of the case, indicating that the so-called new or last bond was no more than the last link in a chain of continuing insurance.

It will be admitted that the last bond is not *per se* the contract between the parties. At most it is a mere piece of evidence indicating with more or less conclusiveness what the contract was. The degree of its evidential conclusiveness depends upon the circumstances of the case.

The so-called new bond is not the only written instrument in the case calculated to evidence the nature and scope of the contract existing between the parties. There is the written application delivered to the surety company in 1906, on which the original bond was issued. There is the original bond (No. 450) issued April 1, 1906, insuring the bank for the "term mentioned (one year) or any subsequent renewal of such term." There are the six annual "continuation certificates" for the years 1907, 1908, 1909, 1910, 1911 and 1912, each *"continuing in force bond T. 450"* for the term of one year. There is the bank's letter to the surety company written in November, 1913, concerning the failure of the surety company to issue the customary "continuation certificate" on April 1, 1913, for the year 1913-1914 and insisting that the

"continuation" should be as of that date. Then there is the so-called new bond issued in November, 1913, but dated back to April 1, 1913, pursuant to the bank's demand.

Clearly all of these writings have an evidential bearing upon the contractual relation of the parties and upon the question as to whether the nature and scope of that relation subsequent to April 1, 1913, was distinct and different from that existing theretofore. They must all be considered together before the true evidential significance and real legal effect of any one can be determined. We have here either one indivisible contract for continuing insurance evidenced by all of these instruments, as contended by plaintiff in error, or two distinct contracts, the second or latter evidenced alone by the so-called new bond, as contended by defendant in error. How can the court determine that question without giving due consideration to all of these written instruments?

The intention of the parties must be sought. That alone is the contract. All of these writings tend to reveal that intention. They must be all considered, and not alone as distinct evidential matters, but in respect to their relation one to the other as well. The so-called new bond came last in point of time, and, of course, as a mere writing, stands alone. But considered with the others and in the light of the continuing insurance previously in force, should this last writing be given the effect of merely continuing or

radically changing the contractual relation between the parties?

Here is no question of the parol rule, but rather due consideration of all the written evidence bearing upon the intention of the parties which is the contract; no question of varying the terms of this last written instrument, but determining what its terms signify when read with these other written instruments and in the light of the situation in which it was executed.

There are, besides these previous writings, two facts connected with the execution of the so-called new bond which should also be considered in determining whether it should be said to evidence a new contract or a mere continuance of the original bond. The last bond was issued without any suggestion or requirement that the bank make a new application for insurance with the customary representations and promises and warranties. Furthermore, the circumstances under which the last bond was issued were of the surety company's own making. Prior to 1913 all of the business between the parties had been transacted in Seattle. The officers of the bank were there, the original bond was written there and all of the six annual "continuation certificates" were issued there. Shortly before April 1, 1913, the surety company changed its Seattle agent and instead of collecting the premium for the ensuing year of 1913-1914 from the officers of the bank in Seattle, as had always theretofore been done, the new agent mailed the premium-due notice

to the insured employee at Ketchikan, Alaska. The guilty employee returned the notice with the statement that no further insurance was desired. In November, 1913, it having come to the knowledge of the officers of the bank that the premium for the year 1913-1914 had not been paid, they wrote as above stated demanding an explanation and a continuance of the insurance. The surety company acknowledged its responsibility for the situation by immediately issuing the last bond without the customary application therefor and dating it back to April 1, 1913. There is another fact that has a bearing upon the interpretation the last bond should receive. Its issuance was the result of the adoption of a new form of bond by the surety company. Its simpler form and more liberal terms were doubtless intended to appeal to the fidelity insuring public. The variance between its terms and those of the original bond will be considered later.

This appeal is from the judgment of the lower court following its ruling sustaining an objection to the introduction of any and all evidence on behalf of plaintiff and holding as a matter of law that there could be no recovery on account of any loss occurring prior to April 1, 1913, the date of the new bond. This court has affirmed that judgment upon the ground that the bond of April 1, 1913, was "a new and independent contract of insurance" for the reason that its terms were in some respects different from

those of the original bond. There is no indication that the so-called new bond was by this court construed and interpreted in connection with the original bond and the six "continuation certificates" which continued it in force up to April 1, 1913. There seems to have been a mere comparison of the two bonds. Nor was any consideration given to the circumstances of the issuance of the new bond. It was held to be "a new and independent contract of insurance" because its terms were broader than those of the original bond.

But its broader terms necessarily included the less broad terms of the original bond. Furthermore, recovery is not sought under any enlargement of the terms of the original bond but rather strictly within tht narrower obligations of the old bond which were necessarily embraced and included within the broader obligations of the new bond.

The enlargement of the obligation of the surety company under the new bond as compared with the old bond can not bar recovery if it should be said from a consideration of the entire transaction that the new bond was given for the purpose and with the intention of further continuing the continuing insurance theretofore for seven successive years in force.

It is the contention of the plaintiff in error that there was but one transacion, one insurance and one contract. That major issue is clearly made by the pleadings and the admissions of counsel in their statements

to the jury upon which alone the lower court acted in ruling upon the motion to exclude and plaintiff's offer of proof. And that major issue as to whether the new bond was no more than the last link in an unbroken chain of continuing insurance, is in no wise dependent upon the allegations of the complaint as to a primary agreement for continuing insurance apart from the written instruments executed for its effectuation. The law makes the issue for us out of the interwoven written context of the entire transaction beginning in the spring of 1906 and ending in the fall of 1913.

Beyond all possible peradventure the original bond (No. 450) insuring against loss "during the term above mentioned (one year) or any subsequent renewal of said term," provided for continuing insurance. Beyond all possible peradventure the six "Continuation Certificates" "continuing in force Bond T. 450" did as a matter of fact and law continue that insurance to April 1, 1913. From April 1, 1906, to April 1, 1913, there was but one bond, viz: "Bond T. 450," but one insurance and but one contract. That insurance was continuing insurance and that contract was for continuing insurance.

The transaction was none the less single because of the recurring annual payment of premiums and issuance of "continuation certificates." The minds of the parties had clearly met upon the contractual core of continuing insurance and everything done orig-

inally and thereafter from year to year was by way of effectuating that mutual core purpose.

That was the situation and contractual relation down to April 1, 1913. The bank has done absolutely nothing since that date by way of changing that situation and that contractual relation. Whatever has been done to effect a change has been done by the surety company who now pleads its own act as an excuse for refusing to fulfil its obligations after taking the bank's premium money.

It was clearly the fault of the surety company that the premium was not collected on April 1, 1913, and a "continuation certificate" issued as had been done every year for seven years. It was the rankest kind of negligence for the surety company to send the premium-due notice to Mitchell. It was not even addressed to the bank at Ketchikan but to the insured employee. This is admitted by counsel for the surety (Tr., p. 109). This negligence the surety company acknowledged and undertook to cure when in response to the complaint and demand of the bank in November, 1913, it issued the so-called new bond without application and dated it back to dovetail with the last "continuation certificate."

What was it that the bank demanded in November, 1913? A new bond? No. A new contract of insurance? No. A more liberal contract? No. Coun-

sel for the surety company in his statement to the jury said (Tr., p. 80):

> "Then in November some time they come to us and say, 'How is it that *that bond* was not issued in April? We wanted *that bond.*' Of course they had not paid any premium for any bond, but they said, 'We want *that bond,* and will you kindly write it and date it back to April 1st.'"

The statement of counsel for the bank as to this matter is as follows:

> "The bank here at Seattle had procured that bond, in the first instance. It had paid the premium, and the business had all been transacted here, and but for the change of the agency, to which counsel referred, that renewal certificate would have been issued by the old agency. Then we will offer evidence to show, that it was not ourselves who made the discovery that this was not renewed, but that it was made by the old agent of the company, who then went to this company, and asked them—called their attention to it, and they agreed with him that it should be renewed, and he went to the bank, and asked them if they knew this bond had not been renewed. That is the way they got the information. The bank had depended solely upon the surety company to keep it renewed. No application had been given. It is the absolute requirement of this company and of all companies, that upon the execution of a new bond, a written application must be given. None was taken in this case. The company treated it as a renewal and dated it as a renewal—dated it as of the date they should have renewed it originally."

The contractual relation between the parties calling for continuing insurance having been established and without break maintained down to April 1, 1913, that relation and that contract and that continuing insurance could be changed to a new contractual relation on the basis of broken term insurance only by the assenting action of both parties. The original bond, No. 450, unquestionably bound the surety company to give the bank continuing insurance. The six "continuation certificates" so far from evidencing independent contracts for broken annual term insurance, by their terms expressly recognized the obligation under "Bond No. T. 450" for continuing insurance. They each expressly *"continue in force Bond T. 450."* And therein by their express terms sharply distinguished themselves upon the premium receipts or certificates held to evidence independent annual term contracts in the cases cited and relied upon by the surety company of the class represented by

> *De Jeanette* v. *Fid. & Cas. Co.,* 98 Ky., 558, 33 S. W., 828;
> *Fla. Cent. etc. Co.* v. *Am. Surety Co.,* 99 Fed., 674;
> *Proctor Coal Co.* v. *U. S. F. & G. Co.,* 124 Fed., 424.

The contract for continuing insurance being thus firmly established, and being in writing, was unquestionably maintained down to April 1, 1913. Was it

then or thereafter changed or modified? and if so how? Certainly not by any act or assent of the bank. In November, 1913, we find the bank standing firmly upon its contract rights and insisting that it was entitled to *"that bond."* They write, "How is it that that bond was not issued in April?" To their non-technical minds the "continuation certificate" was *"that bond."* "We want *that bond,* will you kindly write it and date it back to April 1st?" The old agent of the company had discovered that the April premium had not been paid and the customary "continuation certificate" issued, and after taking it up with the surety company and the company having admitted that the bond should be renewed, called the matter to the attention of the officers of the bank.

Clearly the bank was standing and insisting upon its right under the written contract to a continuation of the insurance for the year 1913-1914. It is equally clear that the surety company *then* intended that the bank should believe that it was getting what it demanded under the existing contract, viz.: continuing insurance for the year 1913-1914. It promptly acceded to the demand for *"that bond"* by issuing the so-called new bond, without a new application and further post dated it to match the requirements of continuing insurance. Clearly the bank thought and believed that it was getting what it demanded, viz.: its right under the existing contract to continuing insurance. And as clearly the surety company wished

and intended that the bank should so think and believe. They took the bank's premium money for the year 1913-1914 and gave it what? *A policy of continuing insurance!* A policy of indefinite term, terminable only upon three contingencies, viz.: (1) Upon written notice by the bank, (2) Upon written notice by the surety company, (3) Upon non-payment of annual premiums, (4) Upon discovery of loss through the employee insured.

The surety company contends *now* that the new bond while it was for continuing insurance did not continue the continuing insurance unquestionably called for by the earlier contract; that by its juggling substitution of the so-called new bond for the customary "continuation certificate" it was enabled to step out from under its contractual obligation for continuing insurance and assume its smug stand upon a new and independent contract of insurance. That while the original bond called for continuing insurance and the new bond calls for continuing insurance the chain of continuity was broken by the giving of the new bond.

It will be admitted that the bank requested and demanded and thought it got continuing insurance in which there was no break. The surety company must admit that it knew the bank so thought and believed. But they say the foolish bank lost its right to continuing insurance by accepting the new bond instead of the customary "continuation certificate"; that the more

liberal terms of this so-called new bond must in law prevent its being considered as a continuance of the original bond.

This new form of bond adopted by the surety company was calculated and doubtless intended to be attractive to the fidelity insuring public. It was a well calculated lure for renewal as well as new business. Its purpose was to get more business and more money. It is claimed by the surety company that its variant terms make it, in this case, a new and independent contract of insurance. That notwithstanding the request and demand of the bank for *"that bond"* of continuing insurance under the existing contract represented by the original bond, and notwithstanding the bank thought it was getting "that bond" of continuing insurance when it paid the renewal premium for the year 1913-1914, and notwithstanding the surety company pretended to accede to the demand of the bank and without requiring or suggesting a new application for insurance issued the new bond and dated it back to correspond to and connect with the last "continuation certificate," the so-called new bond by reason of its broader terms became and was a new and independent contract of insurance, in no way connected with or a continuance of the continuing insurance called for by the original bond. And with a truly brazen effrontery the surety company asks this court to place the seal of its approval upon this flim-flam game and say that in spite of the bank's un-

doubted contract right to continuing insurance, and the payment of its premium money in the belief that it was getting continuing insurance, the surety company by the substitution of this so-called new bond for the customary and stipulated "continuation certificate," successfully "put one over" on the bank and eluded its obligation and liability under the original bond and its six formal "continuations." In the language of Kipling that is "a damned tough bullet to chew" and it is here suggested that this court is not required to masticate it.

Let us examine the variant terms of this so-called new bond which according to the surety company's *present* contention so deftly and completely emasculates the right of the bank to indemnity notwithstanding its payment for eight years of the price of such indemnity. It is identical with the original bond in that it is issued to the bank and insures the fidelity of a certain employee. It is identical with the original bond in that it provides for continuing insurance, conditioned only upon the payment of the annual premiums. It is identical with the original bond in the amount of the insurance. The only difference between the two bonds is that to be discovered in the liability clause. The original bond insured the bank against loss by reason of the fraud or dishonesty of the employee amounting to embezzlement or larceny. The guaranty of the so-called new bond is against loss occasioned by any act of fraud, dishonesty, forgery,

theft, larceny, embezzlement, wrongful abstraction, or misapplication or misappropriation or any criminal act of the employee.

It is sufficiently evident that the narrower liability of the original bond is embraced and included in the broader liability of the new bond. If the so-called new bond should be held to continue the continuing insurance provided by the original bond it would amount to a continuance of the liability fixed by the original bond as to losses occurring prior to April 1, 1913, coupled with the broader liability provided by the new bond for any loss occurring subsequent to April 1, 1913. Such a construction of the new bond would satisfy the right of the bank to a continuance of the continuing insurance provided for by the original bond and at the same time give the bank the benefit of the more liberal terms of the new policy as to any loss that might occur subsequent to April 1, 1913. That would be "the more reasonable interpretation, and accord more nearly with the justice of the matter" (*Am. Credit Ind. Co.* v. *Champion,* 103 Fed., 609), for not only should the surety company be held to have intended to keep faith under the original bond, but it should be presumed to have intended to extend to this old customer the benefit of its new and more liberal policy of insurance as to future losses.

Was not that the intention? May we not infer as a matter of law that the surety company wanted

and intended to play fair, and that its present notion as to the so-called new bond being a second and independent contract for continuing insurance was later born of the exigency of a threatened $25,000 loss?

It is an accepted rule that a contract of this character will be construed strictly against the surety company and in favor of the party insured. The reason for the rule is apparent in high degree of technical knowledge concerning the general subject-matter presumably possessed by the insurer and the presumably relative meager equipment possessed by the insured for a technical estimate of the legal effect of policy forms tendered him. The insured has no choice but to accept or reject the forms of policy tendered by the insurance company. He can take them or leave them. If he wants insurance he must accept what is offered. There is no chance for him to insist upon a form of policy to his liking. On the other hand the insurance company incubates its policy forms much as a spider spins its web. The controlling idea being to put out a form that combines the greatest seeming liberality with the least real liability. That being naturally true the courts have reasonably held that such contracts will be strictly construed against the party that prepares them and forces their acceptance by the insuring public.

Viewed in the light of this reasonable rule, and of the existing written contract for continuing insurance represented by the original bond, and its six "continua-

tion certificates," and the fact that the bank demanded a further continuance of such continuing insurance, and the further fact that, in writing the new bond in response to that demand and without new application therefor and by post dating it to match the last "continuation certificate," the surety company led the bank to believe that it was getting the continuing insurance demanded, a just construction of the new bond, including as it does within its more liberal terms the narrower liability of the original bond, should NOT hold the new bond to be an independent contract of insurance totally disconnected with the preceeding seven-year contract for continuing insurance.

Every contract has its object and its subject. The object of the contract naturally constitutes its dominant note. If there be uncertainty or ambiguity as to its terms, or, if, where several writings evidence the contract, as here, their true relation each to the other is a matter of uncertainty or doubt, the object of the contract or purpose to be served should be consulted as evidencing the intended significance of the terms employed.

There can be no manner of doubt in this case that from first to last the object of the bank was continuing insurance. The first bond provided for it. The six "continuation certificates" provided for it. The new bond provided for it. The sole question presented by this record is as to whether the object and purpose of the new bond for continuing insurance was to con-

tinue the continuing insurance provided by the original bond, or to initiate a new and independent contract for continuing insurance altogether detached from and disconnected with the pre-existing contract for continuing insurance. The bank says that it was all one transaction having the single object of continuing insurance. The surety company contends that the object of continuing insurance under the original bond had been completely consummated and that the new bond constituted a new contract notwithstanding its object was also continuing insurance; that there was no connection between the object of the original bond contract for continuing insurance and the object of the new bond for continuing insurance. The falsity of this later born conception of the surety company is manifest upon the face of its welching contention.

There can be no doubt or question about the bank's understanding of the so-called new bond, or that it thought and believed it was paying for and getting continuing insurance. Similarly there can be no doubt or question about the surety company's understanding that the bank paid its 1913-1914 premium with that thought and belief. And the sole question raised by this appeal is as to whether the surety company should be permitted to "shift the cut" on the bank and side-step its liability when a loss is discovered.

Fidelity insurance is necessarily and essentially a gamble. The surety company wagers the amount of

the penalty of its bond against the premiums provided for on the average honesty of men. Rarely it loses; generally it wins. The gamble is legitimate on both sides. The employer can afford to add the premium to the overhead charge for the sake of the assurance. Experience has demonstrated that the surety company on a broad average can afford to make the bet.

There are square roulette wheels where the fixed percentage makes the game profitable for the banker. There is a crooked wheel known as a "mule's ear" where a covertly manipulated needle out-thrust in the runway of the little ball forestalls the heavier losses. It is here submitted that this so-called new bond with its more liberal terms was, in this situation, a covertly manipulated needle in the runway of the surety company's liability. If this "mule's ear" be within the law then nothing is required but a certain amount of dexterous manipulation to make fidelity insurance a "sure thing" game.

The brief of plaintiff in error heretofore filed herein affords ample grounds for reversal. It is conceived that the principal function of a petition for rehearing is to make the court really *want* to review its former ruling. This is most likely to be accomplished by indicating that the former decision amounts to a miscarriage of justice. That appearing it is assumed that the court will gladly embrace the opportunity of reconsidering the law of the case with a view

of determining if indeed the law really requires the seeming miscarriage of justice.

There is really but one legal proposition here involved that was not fully and exhaustively considered in the brief of plaintiff in error. That is, that in construing a contract the intention is to be collected, not from detached parts of the instrument, but from the whole of it; and where several instruments are made as a part of *one transaction,* they will be read together, and each will be considered with reference to the other.

> 9 *Cyc,* 580, and many cases cited in Note 4, including
> *Pittsburg, etc. Co.* v. *Keokuk, etc. Bridge Co.,* 155 U. S., 156;
> *Baily* v. *Hannibal, etc. R. C.,* 17 Wall., 96;
> *Telfer* v. *Russ,* 60 Fed., 224;
> *Thompson* v. *Beal,* 48 Fed., 614;
> *Woodwards* v. *Jewell,* 25 Fed., 689;
> *Lamb* v. *Davenport,* 1 Sawy., 609;
> *Wildman* v. *Taylor,* Fed. Cas. No. 17,654.

It is respectfully submitted that the decision of this case amounts to a miscarriage of justice, and that if the so-called new bond be read and considered in connection with the other written evidences of the inten-

tion of the parties, it should not be held to be an independent contract of insurance.

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This is to certify that in my judgment the foregoing petition for rehearing is well founded and it is not interposed for delay.

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